

CONFIDENTIAL

2015

Re: Case No. 15042.Q, Reverse Revolving Door, Interest in City Business

I received a request for an opinion addressing the relevant restrictions in the City's Governmental Ethics Ordinance (the "Ordinance"), and, to the extent I can address them, the City's Personnel Rules, that would apply to [XC] were [XC] to become [a City employee] .

[XC] is currently [an officer] at [C, a public company]. [XC] owns approximately shares of [C] common stock, all of which [XC] acquired as part of [XC's] compensation package as an employee of the company, through bonuses and deferred compensation. XC will also receive additional [C] shares in [a later year] , and a cash compensation bonus in both of which [XC] earned as compensation for work performed in the course of employment with [C]. All of [XC's] shares and bonuses have been and will continue to be taxed as ordinary income when he receives them, the stock being valued at the then-current market price of [C] stock on the acquisition date. . [C] has contracts with the City,¹ but [XC] will recuse from any and all City matters involving [C] or any of its affiliated entities for as long as necessary in order to comply with the Ordinance's requirements.

This letter will summarize how the Ordinance and the Personnel Rules apply. I will discuss the relevant provisions in the order they appear in the Ordinance. As explained below, I conclude that [XC] need not sell any [C] shares, and may accept the shares and any bonus [XC] will receive in early 2016, subject to the restrictions detailed in this letter.

I. The Ordinance. Several provisions apply.²

1. Conflicts of Interest; Improper Influence, §§2-156-030(a) and -080(a). These are two related Ordinance sections. Read together, they will prohibit [XC] , as a City employee, from making, participating in, or in any way attempting to use his position to influence any City governmental decisions or actions in which he knows or has reason to know that he has a "financial interest distinguishable from its effect on the public generally," or from which he "has derived any income or compensation during the preceding twelve months[,] or from which he reasonably expects to derive any income or compensation in the following twelve months." [XC] , of course, will have earned income and compensation from [BEP] in the 12 months preceding his City employment . These two provisions, narrowly read, would

1. See http://www.cityofchicago.org/content/dam/city/depts/doit/general/contractor_reports/2015/06_June2015.pdf

2. The entire Ordinance is posted on our website: <http://www.cityofchicago.org/city/en/depts/ethics.html>

prohibit [XC] from participating only in *matters* from which he has derived (or would expect to be paid) income or compensation in the 12 months preceding [XC's] start date , but not necessarily from all matters involving [C].³ However, as noted in Section 3 of this letter, [XC] is subject to the reverse revolving door provision, and will need to recuse from participating in all such matters for his first two years as a City employee anyway. Moreover, in previous cases, the Board has interpreted these sections (and its predecessor sections) broadly, to apply to *all* City matters concerning a City employee's outside (non-City) employer, even if he or she has no monetary or financial interest in the specific matter. See, e.g. Case Nos. 15027.Q; 98062.A.

Thus, given the [City] position, I advise that, for as long as [XC] owns [C] stock, [XC] recuse from participation in all matters before any City department or agency that directly involve [C] or its affiliated entities, and, further, advise that [XC] refrain from participating in any matters that would benefit [BEP] or other affiliated entities that may be pending before any "sister agencies," such as the Chicago Transit Authority, Chicago Public Schools, Chicago Park District, or Public Building Commission. In the event that personnel from [XC's City department] would need to get involved in these matters, [XC] should recuse fully from participating in such work, advising [other City personnel] on it, or consulting on it with colleagues from the [department] or [others] reporting to [XC] , and enable City colleagues to handle this work without his involvement. Best practice here will be for [XC] to designate in advance and in writing specific [personnel] to handle these matters if and when they arise.

2. Interest in City Business, §2-156-110(a) and (b). These subsections of the Ordinance do two things. First, §2-156-110(a) prohibits a City employee like [XC] from having a "financial interest in his own name or in the name of another person in any contract, work of business of the City." In essence, this means that a City employee may not have an ownership interest that is worth more than \$1,000 in a City contract, whether directly, as, say, an independent contractor to the City, or indirectly, as, say, an owner of a firm or entity that has one or more City contracts. As discussed in the next few paragraphs below, "financial interest" is defined in §2-156-010(l). However, regardless of that definition, [XC] does not have a financial interest in either [C] or its City contracts under *this* subsection, §2-156-110 (a)(i), because it provides an exception for ownership of less than 1% of the outstanding common stock in any entity or its parent, subsidiary or affiliate, as long as the shares are registered on a securities exchange. [XC's] [BEP] common stock is so registered, and obviously represents less than 1% of [C's] outstanding common shares. Thus [XC] will not violate this provision by continuing to own [C] stock, even if [C] or its affiliated entities continue to have City contracts or business.

Second, §2-156-110(b) would prohibit [XC] , as a City employee, from exercising "contract management authority"⁴ over any City contract, work or business if he has a financial interest in any entity that is a contractor, subcontractor, or otherwise a party to the transaction. For §2-156-110(b), the general definition of the term "financial interest" in the Ordinance is indeed relevant. As defined in §2-156-010(l), it means, in relevant part:

an interest held by an official or employee that is valued or capable of valuation in monetary terms with a current value of more than \$1,000.00, **provided that such interest shall not include (1) the**

3. For reasons discussed below, [XC] does not and will not have a financial interest in [C] or in any of its matters before the City.

4. As defined in §2-156-010(g) of the Ordinance, "contract management authority" means personal involvement in or direct supervisory responsibility for the formulation or execution of a City contract, including without limitation the preparation of specifications, evaluation of bids or proposals, negotiation of contract terms or supervision of performance. There are no cases in which the Board has concluded that [someone in XC's position] actually exercised contract management authority, but we include this advice for the sake of completeness.

authorized compensation paid to an official or employee for any office or employment ... or (5) any ownership through purchase at fair market value or inheritance of not more than \$15,000.00 worth of the shares of a corporation, or any corporate subsidiary, parent or affiliate thereof, regardless of the dividends on such shares, if such shares are registered on a securities exchange pursuant to the Securities Exchange Act of 1934, as amended. Such interest also shall not include any ownership by a current official or employee through purchase at fair market value or inheritance of less than one percent of the shares of a corporation, or any corporate subsidiary, parent or affiliate thereof, regardless of the value or dividends on such shares, if such shares are registered on a securities exchange pursuant to the Securities Exchange Act of 1934, as amended, and if such ownership existed before November 1, 2012. [emphasis supplied]

The Board of Ethics has for years recognized that “financial interest” is limited to and can arise only from an *ownership* interest in a business entity, in other words, that City employees and officials have neither an ownership interest nor therefore a financial interest in an entity that merely employs them. See, e.g., Case Nos. 04049.A; 98009.Q. That is true regardless of whether the entity is the City itself, or, more importantly, for this conflicts of interest law, in their non-City employer (that is, their secondary or even pre-City employer).⁵ Thus, the question here is whether [XC’s] ownership of [C] stock—which is clearly worth more than \$15,000, but which [XC] did not purchase at fair market value or inherit—gives [XC] a financial interest in [C] for purposes of §2-156-110(b), and thus would require [XC] to refrain from exercising contract management authority with respect to [C] City contracts.⁶ We conclude that it does not. The reason is that [XC’s] common stock in [C] was part of [XC’s] authorized compensation package from [BEP]. This is witnessed by the fact that [XC] was taxed at ordinary income rates for these shares when they were received, and [XC] received them as part of a compensation package, and the shares were valued at the market value at the time [XC] received them. Thus, [XC’s] ownership of [C] stock falls under the exception in §2-156-010(l)(1). [XC] does not have a financial interest in [C] by virtue of owning these shares.

Nonetheless, and consistent with the guidance given throughout this letter, I advise that, given [XC’s] position [XC] refrain from exercising contract management authority with respect to City contracts with [C] or any of its affiliates.

However, what this *does* mean is that [XC] must refrain from exercising contract management authority with respect to any other publicly-traded company whose stock [XC] purchased or otherwise acquired on or after November 1, 2012 that is worth more than \$15,000. See Case 15033.Q.

3. The “Reverse Revolving Door,” §2-156-111(d). This section prohibits a City employee from “personally participating in a decision-making capacity” for two years from the date he begins City employment, in a matter that “benefits his immediate former employer or immediate former client who ... he represented or on whose behalf he acted as a consultant or lobbyist prior to ... becoming a City official.” [XC] will be prohibited for his first two years as a City employee from participating in any matters before any City department or agency that “benefit” [C]. Given [XC’s] position [XC], we again advise that [XC] refrain from participating in any matters that would benefit [C] that may *also* be pending before any of the City’s “sister agencies,” like the

5. This phrase refers to compensation that a City employee or official receives from his or [XC’s] non-City position—meaning that employment alone in any or with any entity does not give one a financial interest in the entity. The phrase could, of course, refer to one’s compensation from the City, but that would be meaningless, because it would be of no consequence if one *had* a financial interest in the City, because nothing in the Ordinance would prohibit it—even if one could own part of a municipal corporation.

6. As discussed below, the conclusion that [XC] does not have a financial interest in [C] by virtue of owning stock in it is also critical to the analysis under the City’s Personnel Rules.

Chicago Transit Authority, Chicago Public Schools, Chicago Park District, or Public Building Commission. In the event that personnel from [XC's department] would need to get involved in such matters, [XC] should recuse fully from participating in such work, advising or consulting with colleagues, etc., on it, and enable colleagues to handle such work without involvement.

These are the key provisions of the Ordinance that govern [XC's] transition period to [City employment]. Of course, there are others to which [XC] will be subject, but [XC] will receive training on them.

II. Personnel Rule XXIX. I now discuss the relevant City Personnel Rule.⁷ As a jurisdictional matter, please note that neither I nor the Board of Ethics itself has the authority to issue binding or authoritative guidance or interpretations as to the City's Personnel Rules. However, as we discussed, the relevant Rule here (Rule XXIX, entitled "Conflict of Interest") is based on an earlier version of the Governmental Ethics Ordinance, and thus I believe that my discussion and conclusions are persuasive, even if not legally binding or reliable in the event of a subsequent investigation, as would be the case with an advisory opinion interpreting and advising someone under the Ethics Ordinance.

The relevant Personnel Rule is XXIX, Section 2(a) ...

Put plainly, this Rule, first enacted in 1997, prohibits [covered personnel] from having any outside "financial interests." Although the Rule's text above refers to the definition of "financial interest" in the Ordinance, the Rule itself contains its own definition (which, I point out here, is based on a version of the Ordinance that expired on November 1, 2012).⁸ Among the exclusions to "financial interest" as defined in this Rule XXIX are: (i) any ownership through purchase at fair market value or inheritance of less than one percent of the shares of a corporation, or any corporate subsidiary, parent or affiliate thereof, regardless of the value of or dividends on such shares, if such shares are registered on a securities exchange pursuant to the Securities Exchange Act of 1934, as amended; and (ii) the authorized compensation paid to an official or employee for his office or employment.

However, for the same reasons that [XC] does not have a financial interest in [C] under the Ordinance by virtue of ownership of [C] common stock, [XC] does not have a financial interest in [C] under this Rule, as the entire allotment of [C] shares is and will be part of [XC's] authorized compensation from [C].

Do note, though, that, during City employment [XC] will be prohibited under this Personnel Rule from acquiring a "financial interest" in any person. In particular, this will mean ownership in an entity (other than a publicly traded company of whose outstanding stock [XC] owns less than 1%) that is worth \$5,000 or more (please note that, under the Ordinance, that threshold has been lowered to \$1,000), or that entitles [XC] to receive more than \$2,500 per year in income or dividends or other distributions (under the Ordinance, that threshold also has been lowered to \$1,000).

III. Conclusions. As discussed above, [XC] must refrain from participating in any City decisions or matters involving [C] for his first two years of City employment. [XC] is also advised: (i) to refrain from participating in any such matters that involve any corporate subsidiary, parent, or affiliate of [C] for as long as [XC] owns [C] stock; and (ii) to refrain from becoming involved in any such matters that may be pending before the City's sister agencies for as long as [XC] owns [BEP] stock; and (iii) to establish a written protocol under which personnel in the [D] would handle such matters, if [XC] would

8. These Rules are posted on the City's intranet: http://my.cityofchicago.org/dam/intranet/documents/depts/dhr/POLICIES/2014PERSONNELRULESFINAL_2014_v3.pdf

9. As we discussed, it may be timely to revise this Rule to conform to the most current version of the Ordinance. I and my staff will be happy to help with that effort.

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otherwise get involved (my office can help set this up). Finally, [XC] is advised that that Personnel Rule XXIX prohibits [XC] from acquiring or having a financial interest in any person (as defined in the Rule).

These conclusions do not necessarily dispose of all the issues relevant to this case, but are based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in this letter, and, where indicated, to a reading of the City's Personnel Rules that is based on the Ordinance. If those facts are inaccurate, please notify me, as a change in facts may change these conclusions.

I appreciate your conscientiousness.

Please contact me with any questions or follow-up requests for guidance.

Yours very truly,

Steven I. Berlin
Executive Director